Filed 11/9/16 Peltekci v. Roshan CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

SAIT PELTEKCI et al., Plaintiffs and Appellants, v. FEREIDOON ROSHAN et al., Defendants and Respondents.	E064569 (Super.Ct.No. CIVDS1505380) OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Affirmed.

Law Offices of Richard Pech and Richard Pech for Plaintiffs and Appellants.

Chandler Law Firm, Robert C. Chandler, and Carla R. Kralovic for Defendants and Respondents, Fereidoon Roshan and Roshan, LLC.

No appearance for Defendants and Respondents, Christian Jackson and Gateway Legal Group.

After successfully defending an unlawful detainer action, Sait and Albert Peltekci sued their landlord (Fereidoon Roshan and his company Roshan, LLC, collectively Roshan) and the landlord's counsel (Christian Jackson and his firm Gateway Legal Group, collectively Jackson) for malicious prosecution.[1] The trial court granted Roshan's and Jackson's motions to strike under the anti-SLAPP statute (Code Civ. Proc., § 425.16)[2] and dismissed the complaint. On appeal, the Peltekcis argue the trial court's ruling was erroneous because they had demonstrated a likelihood of succeeding on the merits of their malicious prosecution claim. We conclude the Peltekcis cannot demonstrate a likelihood of success and affirm.

I

FACTUAL BACKGROUND

The Peltekcis are tenants in a commercial shopping center in Ontario. In July 2014, Roshan served the Peltekcis with a three-day notice to pay rent or quit (Notice), which sought an estimated $336,432.06 in alleged unpaid rent from February 2011 to July 2014. In September 2014, Roshan filed an unlawful detainer suit against the Peltekcis. The case went to trial and the jury returned a verdict for the Peltekcis, finding they had not missed any rent payments and Roshan had suffered no damages.

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[1] In a separate appeal (case No. E064205), the Peltekcis successfully challenged the trial court's attorney fee award for prevailing in the unlawful detainer suit.

[2] Undesignated statutory citations refer to the Code of Civil Procedure.

In April 2015, the Peltekcis filed the instant malicious prosecution suit, asserting Roshan and Jackson had pursued the unlawful detainer action without probable cause and in bad faith. Roshan and Jackson filed anti-SLAPP motions, arguing the unlawful detainer action was protected petitioning activity and the Peltekcis could not succeed on their allegations regarding probable cause and malice. In their opposition, the Peltekcis argued Roshan lacked probable cause because the Notice violated the unlawful detainer statute, codified at section 1161.

After a hearing on the anti-SLAPP motions in July 2015, the trial court granted the motions, finding there was no evidence Roshan lacked probable cause. The trial court observed the Peltekcis had been unsuccessful in arguing the Notice was invalid during the unlawful detainer litigation. The Peltekcis had moved for judgment on the pleadings on the ground the Notice was defective and the court presiding over the unlawful detainer action held the Notice was valid as a matter of law. The trial court also observed that Sait Peltecki did not dispute in his declaration that some amount of rent was overdue. Based on this, it concluded that even if the Notice had been invalid, Roshan nevertheless had "a reasonable basis to believe [it] had a tenable claim to dispossess Peltecki of the property and collect some of the owed back rent."

The trial court subsequently dismissed the malicious prosecution action and awarded Roshan $4,200 in attorney fees and $960 in costs. The Peltekcis timely appealed.[3]

[3] Roshan filed a respondent's brief, Jackson did not.

II

DISCUSSION

The anti-SLAPP statute provides " 'a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.' " (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1270-1271 (*Hylton*).)

Determining whether a claim is subject to being stricken under the anti-SLAPP statute is a two-step process. "In the first step, the defendant bringing an anti-SLAPP motion must make a prima facie showing that the plaintiff's suit is subject to section 425.16 by showing the defendant's challenged acts were taken in furtherance of his or her constitutional rights of petition or free speech in connection with a public issue, as defined by the statute." (*Hylton, supra*, 177 Cal.App.4th at p. 1271.) "If the defendant does not demonstrate this initial prong, the court should deny the anti-SLAPP motion and need not address the second step." (*Ibid.*) "If the defendant satisfies the first step, the burden shifts to the plaintiff to demonstrate there is a reasonable probability of prevailing on the merits at trial." (*Ibid.*, citing § 425.16, subd. (b)(1).) "Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the

liability or defense is based.' " (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

We review rulings on anti-SLAPP motions de novo. (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 727.) We also consider the pleadings, and supporting and opposing affidavits, " 'accept[ing] as true the evidence favorable to the plaintiff [citation] and evaluat[ing] the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.' " (*Ibid.*)

The Peltekcis concede their complaint is subject to section 425.16. The sole issue on appeal is whether they demonstrated a reasonable probability of prevailing on the merits. To establish probability of prevailing on the merits, a plaintiff " ' "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." ' " (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89.)

There are three elements to a civil malicious prosecution claim: the prior civil action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50.) The jury verdict was for the Peltekcis, so the first element is satisfied.

As to the second element, "[p]robable cause exists when a lawsuit is based on facts reasonably believed to be true, and all asserted theories are legally tenable under the known facts." (*Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th

1095, 1106.) In other words, the Peltekcis must demonstrate Roshan's unlawful detainer claim was "legally untenable or based on facts not reasonably believed to be true." (*Ibid.*) "This objective standard of review is similar to the standard for determining whether a lawsuit is frivolous: whether 'any reasonable attorney would have thought the claim tenable.' " (*Ibid.*)

The Peltekcis argue the unlawful detainer claim was legally untenable because the Notice violated the unlawful detainer statute in two ways. Neither of the alleged violations has merit.

First, they argue the Notice failed to seek the exact rent due, as required by section 1161(2). (See § 1161(2) [notice must state "the amount which is due"]; see also *Ernst Enterprises, Inc. v. Sun Valley Gasoline, Inc.* (1983) 139 Cal.App.3d 355, 359 [a notice that seeks rent in excess of the amount due is invalid and will not support an unlawful detainer action].) They point out Jackson argued at trial in closing that Roshan had reasonably tried to calculate the amount of overdue rent and that it was the jury's job to determine what amount is reasonable. They claim this demonstrates Roshan did not know how to calculate the overdue rent and as a result the Notice necessarily sought an inexact amount.

This argument fails because the "exact rent due" rule does not apply to commercial leases. So long as the amount sought in a notice served on a commercial tenant "is clearly identified by the notice as an estimate . . . the tenant shall be subject to judgment for possession and the actual amount of rent and other sums found to be due."

(§ 1161.1, subd. (a).) As explained in *Levitz Furniture Co. v. Wingtip Communications, Inc.* (2001) 86 Cal.App.4th 1035, 1037 (*Levitz*), the addition of section 1161.1 removed the "exact rent due" rule from the commercial context, thereby " 'ameliorat[ing] the consequences of a commercial property landlord's failure to provide the correct claimed amount in the . . . notice." (*Levitz*, at p. 1040.) "Such amelioration makes sense in a commercial context, where monthly rent [is] not always easily fixed or readily ascertained by simply reading the terms of a lease . . . If a landlord is required to fix the exact sum due at his peril, unlawful detainer becomes an elusive—if not unavailable—remedy. By permitting a landlord to set out a reasonable estimate of the sum due, unlawful detainer becomes a viable remedy for commercial landlords." (*Ibid*.) Here, the Notice satisfied the requirement in section 1161.1. It stated the amounts demanded were "an estimate, but deemed to be as accurate as reasonably possible." Jackson reiterated this point at trial when he asked the jury to determine a reasonable amount of overdue rent.

Second, the Peltekcis argue the Notice was invalid because it sought rent for more than one year prior to its service date. Again, the Peltekcis misapprehend the law governing unlawful detainer notices. "[I]nclusion of rent due for over a year is not fatal to an unlawful detainer action, if the notice *also includes* a demand for payment of rent due within a year of the notice." (*Levitz, supra*, 86 Cal.App.4th at p. 1037, italics added.) "[A] landlord who waits more than one year to sue for rents due from a tenant may be restricted to collecting such rents in a separate action for breach of contract. [Citation.]

Nonetheless, invalidation of an otherwise proper notice (one that reasonably estimates rent due within one year) because it includes a demand for rent due for more than a year is not required by the terms of section 1161(2), the policy underlying that statute, or the case law." (*Id.* at p. 1042.) The *Levtiz* court explained the policy behind the one-year provision in section 1161: "The . . . provision has to do with fairness. It prevents a landlord's sitting on his or her rights, when rent is unpaid at some point during the life of a lease, then using long-overdue rent (but no recently overdue rent) to effect an eviction." (*Levitz*, at p. 1040.) Based on this policy, there is "no reason why a three-day notice that demands payment of rents due within one year of the notice is automatically invalidated because it also sets out (or demands) rent due *more* than a year before the notice. Such invalidation is not [necessary to] . . . prevent[] a landlord from using long overdue rent—but no rent unpaid within one year—to effect an eviction." (*Id.* at p. 1041.) Here, Roshan's inclusion of rent due for more than a year before July 2014 was not a reason to invalidate the Notice.

Contrary to the Peltekcis' theory the unlawful detainer action was "legally untenable" because the Notice was invalid, the record establishes Roshan issued a lawful notice that attempted to estimate the amount of rent due, even if it may have included more rent than Roshan could appropriately seek in a summary unlawful detainer action. It is significant that the Peltekcis have never claimed they owed no rent to Roshan. Throughout the litigation, the Peltekcis argued Roshan had leased 1,500 square feet of their commercial space to another tenant, Yoshinoya, and as a result they stopped paying

the full rent due under the lease. Sait Peltecki stated in a declaration supporting the opposition to the anti-SLAPP motions that he and Fereidoon Roshan frequently discussed "the dispute over the charges for rents. . . . [¶] [Fereidoon Roshan] kept demanding that we pay prior rent before he would discuss a rent credit for the 1,500 square feet given to Yoshinoya."

Our independent review of the record leads us to the same conclusion the trial court reached: Roshan's claim the Peltekcis owed rent and were thus not entitled to possession was not frivolous. Both parties acknowledged a dispute over rent—the issue was the amount owed given the change to the lease space. That the jury found handsomely in the Peltekcis' favor does not affect our conclusion. A claim can be both objectively reasonable and unsuccessful, as was the case here. We conclude the Peltekcis cannot satisfy the probable cause element of their malicious prosecution claim and therefore the trial court correctly granted the anti-SLAPP motions and dismissed the complaint.[4]

[4] Our holding makes it unnecessary to determine whether there is evidence Roshan brought the unlawful detainer action with malice. We also need not address the Peltekcis' contention the trial court made erroneous evidentiary rulings. We do not rely on any of the evidence the Peltekcis challenge to arrive at our conclusion that the unlawful detainer claim was not frivolous.

III

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

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SLOUGH
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.